Supreme Court, U.S.
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No. 02-389

In The
Supreme Court of the United States

THOMAS J. QUINN,

Petitioner,

v.

JOHN SHIREY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR CITY RESPONDENTS

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QUESTIONS PRESENTED

1. Should this Court deny certiorari when the decision below did not decide the first question presented, there is no conflict between the circuits that could warrant review, and the case would make a poor vehicle for reviewing the question even if it were presented and warranted review?

2. Should this Court deny certiorari on the second question presented, which asks this Court to make a fact-specific determination regarding the sufficiency of the allegations of Petitioner's complaint?

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STATEMENT OF THE CASE

Petitioner Thomas Quinn ("Petitioner") filed this action against Respondents the City of Cincinnati ("City"), City Manager John Shirey ("City Manager") (collectively "City Respondents") and various other Respondents associated with Hamilton County, Ohio ("County Respondents"). Petitioner alleged that all Respondents deprived him of a liberty interest in his reputation without due process by terminating his employment under stigmatizing circumstances without providing a name-clearing hearing. After the City Respondents moved to dismiss the complaint on numerous grounds, Petitioner did not argue to the District Court that the motion should be denied because the City Respondents breached an "affirmative duty" imposed by the Constitution to inform Petitioner of an assumed right to a name-clearing hearing. After the District Court dismissed the complaint, Petitioner raised his "affirmative duty" theory for the first time on appeal to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit affirmed the District Court's dismissal of the complaint, but did not decide whether Petitioner's "affirmative duty" theory was legally valid. Instead, the Sixth Circuit found that Petitioner had not claimed that he was unaware of his assumed right to a name-clearing hearing. Pet. App. 16a. The Sixth Circuit also ruled that Petitioner had failed to request a name-clearing hearing. *Id.* at 18a-19a. In light of this resolution, the Sixth Circuit declined to address the four alternative grounds presented by the City Respondents supporting affirmance. *Id.* at 20a.

STATEMENT OF THE FACTS

According to the complaint,[1] the City employed Petitioner as Director of the Metropolitan Sewer District ("MSD") beginning in 1992. Petitioner also had reporting responsibilities to the Hamilton County Commissioners.

From July, 1997, through April, 1998, various individuals made various statements regarding Petitioner and his performance of his job duties. Most of the alleged statements were made more than one month prior to Petitioner's eventual resignation. Many of the statements announced investigations and audits of the MSD and Petitioner's management of the MSD. Two statements involving a grand jury investigation and a report that "sewer tap-in waivers by Plaintiff 'took on the taint of favoritism'" are attributed to newspaper reports and not public officials.

The complaint alleged that: "Any and all of the previously described publicly reported actions and statements by Defendants which either expressed or implied that Plaintiff was a corrupt, dishonest and for these reasons incompetent public employee was or were totally false." The complaint did not allege that: (1) the various audits, investigations, and probes did not in fact occur; or (2) any public official publicly stated that Petitioner was corrupt or dishonest.

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[1] All quotations in this section are from the complaint. For the purposes of this petition, the City Respondents assume the truth of the "facts" alleged by the complaint.

In allegations material to the motion to dismiss, the complaint alleged:

> In the midst of the hostile environment created by the stream of public statements and reports by these City and County officials calling for Plaintiff's termination and announcing several civil and criminal investigations, **Plaintiff communicated to Defendant Shirey on April 28, 1998 that he was innocent of any of these allegations and requested that the City defer any action on the resolution to fire Plaintiff pending conclusion of these audits and grand jury investigations.** Plaintiff's request was based on the fact that pending the outcome of these public inquiries and hearings, it would be impossible for Plaintiff to meaningfully and publicly clear his name of the stigma that had been imposed on him by reason of Defendants' statements and reports.

The complaint did **not** allege that Petitioner was unaware of his "right" to a name-clearing hearing or that the City Respondents failed to inform him of this assumed right.

On April 28, 1998, the City Manager "personally" told Petitioner he would discharge Petitioner if he did not resign the next morning. The complaint concluded that this action by the City Manager constituted a constructive discharge.

Petitioner resigned the next day "for the welfare and benefit of the City and the County."

REASONS FOR DENYING THE WRIT

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT.

A. The Sixth Circuit's Decision Does Not Raise The Question Presented.

The Sixth Circuit did not decide whether public employers have an "affirmative duty" imposed by the Constitution to notify employees of an assumed right to a name-clearing hearing. Instead, the Sixth Circuit ruled that Petitioner failed to allege that he was unaware of his assumed right to a name-clearing hearing. The Sixth Circuit ruled:

> Just as the plaintiff in that case [*Ludwig v. Bd. of Trustees*, 123 F.3d 404 (6th Cir. 1997)] did not claim he was unaware of his right to a name-clearing hearing, neither does Plaintiff in this case make such a claim. Despite the fact that to the extent we addressed the issue of the plaintiff's knowledge of his right to a name-clearing hearing in *Ludwig* at all, we expressly noted that the plaintiff in that case did not claim that he lacked such knowledge; Plaintiff in the instant case failed to allege that he did not know of his right to a name-clearing hearing.

Pet. App. 16a. Therefore, although the Sixth Circuit noted that it had never previously imposed "an affirmative duty on an employer to apprize the employee of his right to a name-clearing hearing," *id.* at 15a, the Sixth Circuit never decided whether such an "affirmative duty" existed in this case because Petitioner's allegations were insufficient to require the Sixth Circuit to reach this issue.

Because the decision below does not address the question presented in the petition, review should be

denied. *See Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (this Court ordinarily declines to consider questions presented in petition for certiorari that were not addressed by court of appeals).

B. The Circuit Decisions Asserted By The Petition Do Not Warrant Review.

The circuit decisions cited by Petitioner do not establish a conflict among the circuits warranting review by this Court. The unpublished Fourth Circuit decision in *Richardson v. Orangeburg School District, No. 1*, No. 94-2092, 1995 WL 255941 (4th Cir. May 3, 1995), does not hold that a public employer has an "affirmative duty" as asserted by Petitioner. *Richardson* involved a qualified immunity appeal where the Fourth Circuit found that the defendants had not afforded Richardson adequate process at a school board meeting. *Id.* at **2-3. Nor did *Lyons v. Barrett*, 851 F.2d 406 (D.C. Cir. 1988), hold that an "affirmative duty" exists. As for *Buxton v. Plant City*, 871 F.2d 1037 (11th Cir. 1989), the single sentence quoted by Petitioner from this opinion does not clearly establish the broad "affirmative duty" asserted by the petition. Indeed, the petition cited no other decisions from the Eleventh Circuit following *Buxton* or supporting the supposed existence of this broad "affirmative duty."

Nor do the cases Petitioner cited as rejecting the asserted "affirmative duty" support review. As previously explained, the Sixth Circuit did not reject or adopt Petitioner's "affirmative duty" contention in its decision. The First Circuit did not pass on Petitioner's "affirmative duty" contention in *Wojcik v. Massachusetts State Lottery Commission*, 300 F.3d 92 (1st Cir. 2002). In *Wojcik*, the First

Circuit simply stated that "the government must have failed to comply with the employee's request for an adequate name-clearing opportunity," which says nothing about whether an "affirmative duty" to notify the employee of the right to request a name-clearing hearing exists. *Id.* at 103. Similarly, the Fifth Circuit decisions in *Gillum v. City of Kerrville*, 3 F.3d 117 (5th Cir. 1993), and *Rosenstein v. City of Dallas*, 876 F.2d 392 (5th Cir. 1989), contain no holding regarding the asserted "affirmative duty."

The "affirmative duty" question is not sufficiently developed among the circuits. Therefore, there is no circuit conflict warranting review.

C. This Case Provides A Poor Vehicle For Reviewing The Question Presented.

Even if the first question presented warranted review, this case would present a poor vehicle for resolving the issue now raised by Petitioner. Petitioner waived his "affirmative duty" contention by failing to raise it before the District Court. Petitioner's complaint does not allege that the City Respondents failed to inform him of his assumed right to a name-clearing hearing or that he was unaware of his assumed right to such a hearing. Petitioner did not argue this "affirmative duty" theory in his memorandum in opposition to the City Respondents' motion to dismiss.[2] The District Court did not address this "affirmative duty" theory in its decision. Pet. App. 21a-24a.

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[2] Petitioner's memorandum did state that the Sixth Circuit had previously "noted that a public employer may be required to advise

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The City Respondents informed the Sixth Circuit that Petitioner's "affirmative duty" contention was "raised for the first time on appeal" and thereby waived. *Id.* at 6a. The Sixth Circuit did not decide whether Petitioner had waived this theory, presumably because it agreed with the City Respondents that Petitioner's failure to allege that he was unaware of his assumed right to a name-clearing hearing required dismissal without the need to address the validity of the "affirmative duty" contention. *Id.* at 16a.

Furthermore, the City Respondents raised four alternative grounds to affirm the District Court's decision before the Sixth Circuit. *Id.* at 20a. These grounds included: (1) the reasons the City Respondents requested Petitioner's resignation were never publicly announced; (2) the statements allegedly made by public officials were insufficient to support a deprivation of liberty interest claim as a matter of law; (3) Petitioner resigned and was not discharged; and (4) Petitioner was not constructively discharged (even assuming a constructive rather than actual discharge could be sufficient). Were this Court to grant review, one or more of these alternative grounds would likely make it unnecessary to resolve the constitutional question presented. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.") (citations omitted).

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employees of their right to name-clearing hearings," but did not argue that this had any bearing on the pending motion to dismiss.

This case does not present a good vehicle to decide the "affirmative duty" question, even were this question worthy of review.

II. THE SECOND QUESTION PRESENTED IS FACT-SPECIFIC AND MERITLESS.

The petition's second question seeks to have this Court review the Sixth Circuit's fact-specific determination that the complaint did not sufficiently allege that Petitioner requested a name-clearing hearing. The Sixth Circuit ruled:

> Even were we to agree with Plaintiff that because he only attempts to bring a liberty interest claim, he did not have to use the exact words "name-clearing hearing," in order for his claim to survive, his request still would have had to "sufficiently apprize" Defendants of his desire for a hearing to clear his name "following the dissemination of the statements." *Ludwig*, 123 F.3d at 411. Plaintiff fails to allege that he informed Shirey that he requested not to be fired so that he could clear his name. **Even accepting the allegations in Plaintiff's complaint as true and construing them in his favor, we do not see how Defendants could be required to interpret Plaintiff's request to keep his job until pending investigations concluded as being tantamount to a request for a name-clearing hearing.**

Pet. App. 18a-19a (emphasis added).

The petition makes clear that it seeks to have this Court review the Sixth Circuit's evaluation of the sufficiency of the complaint's allegations rather than any

general legal principle, despite the purported question presented. Petitioner asserts that: (1) other circuits have found requests similar to Petitioner's "request" sufficient (Pet. at 9); and (2) the Sixth Circuit's decision that Plaintiff failed to request a name-clearing hearing is wrong. (*Id.* at 10).

The Sixth Circuit's decision was consistent with the circuit decisions cited by Petitioner, *O'Donnell v. Barry*, 148 F.3d 1126 (D.C. Cir. 1998), and *Ersek v. Township of Springfield*, 102 F.3d 79 (3rd Cir. 1996). After citing both these decisions, the Sixth Circuit explained that Petitioner had "failed adequately to apprize Defendants in any way that he sought an opportunity to respond to the charges brought against him." Pet. App. 13a-14a n.2. The Sixth Circuit's reasoning is consistent with the D.C. Circuit's statement in *O'Donnell* that a plaintiff need not "make such a [name-clearing hearing] request explicitly, **as long as it is reasonably clear that what the plaintiff complains of includes the lack of a hearing**." *O'Donnell*, 148 F.3d at 1140 n.4 (citation omitted) (emphasis added). Petitioner's request that he not be discharged is distinguishable from the *Ersek* plaintiff's request for an opportunity to respond to the alleged false statements. *Ersek*, 102 F.3d at 85 n.8. More importantly, Petitioner's reliance on these decisions demonstrates that the issue he seeks to have this Court review is fact-specific.

The Sixth Circuit's fact-specific ruling that Petitioner's allegations were insufficient does not present an important question warranting this Court's review. The Sixth Circuit based its decision on the particular allegations of this particular complaint. Review should therefore be denied. Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error

consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Furthermore, the Sixth Circuit's ruling is plainly correct. No reasonable public official confronted with a request not to discharge a public employee (hardly an unusual occurrence) would interpret this as a request for any sort of hearing, much less a name-clearing hearing. The fact that Petitioner resigned further supports this conclusion; Petitioner presumably resigned to avoid further public scrutiny of these events and to avoid having the City Respondents take any public position on the reasons for seeking his resignation. Under these circumstances, it is inconceivable that the City Respondents should have understood Petitioner to desire a name-clearing hearing.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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